

REMARKS

The present application was filed on September 19, 2003, with claims 1-36. Claims 14 and 27 has been canceled and claims 1-13, 15-26 and 28-36 remain pending. Claims 1, 19, 29, 30, 35 and 36 are the pending independent claims.

Claims 1-5, 9-13, 16-26 and 28-34 and 36 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent Application Publication No. 2003/0023679 (hereinafter “Johnson”), U.S. Patent Application Publication No. 2002/0089551 (hereinafter “Hugh”), and U.S. Patent No. 6,611,835 (hereinafter “Huang”).

Claims 6-8 and 15 are rejected under 35 U.S.C. §103(a) as being unpatentable over Johnson, Hugh and Huang in view of U.S. Patent Application Publication No. 2003/0097410 (hereinafter “Atkins”).

Claim 35 is rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0156693 (hereinafter “Stewart”) in view of Johnson and Huang.

With regard to the §103(a) rejections, Applicants submit herewith a declaration of prior invention in accordance with 37 C.F.R. 1.131. The declaration is signed by five of the seven inventors named on the present application, including the three inventors with whom the correspondence submitted herewith as Exhibits 3 and 4 was conducted. Inventor Yiming Ye is deceased, and the whereabouts of his legal representative, Haiyan Wang, are unknown. Inventor Ying Nan Zuo is believed to be overseas and is not readily available to execute documents.

See *Ex parte Foster*, 1903 C.D. 213, 214, 105 O.G. 261 (Comm’r Pat. 1903) (cited in MPEP 715.04) (“The rule says that the inventor’s affidavit will be sufficient; but it does not say that the fact may not be established in some other way. . . . The essential fact is priority of invention, and the Office may accept any satisfactory evidence of that fact. . . . Where the testimony of the inventor cannot be obtained, priority may in some cases be proved without his testimony”)

The declaration and the exhibits attached thereto evidence the conception of an invention falling within the present claims at least as early as July 30, 2003, coupled with diligence toward a subsequent constructive reduction to practice, namely, the filing of the present application on September 19, 2003.

Applicants note that the Huang reference, relied upon in the §103(a) rejections of each of claims 1-13, 15-26 and 28-36, was first published when issued on August 26, 2003, which is the effective date of Huang *under* §102(a). Applicants believe that the claims of the Huang reference and the claims of the present application are neither directed to the same invention nor are obvious variants of one another. Accordingly, Applicants respectfully submit that the declaration is effective to remove Huang as §102(a) prior art.

In view of the declaration, Applicants respectfully submit that Huang qualifies as prior art only under §102(e). Applicants note that both Huang and the present application are currently assigned of record to International Business Machines Corporation ("IBM"). Furthermore, both Huang and the claimed invention were subject to an obligation of assignment to IBM at the time the claimed invention was made. Accordingly, Applicants respectfully submit that, pursuant to 35 U.S.C. §103(c), Huang may not be used in a rejection under 35 U.S.C. §103(a). See "35 USC § 103(c) & CREATE Act of 2004," available at <http://www.uspto.gov/web/offices/dcom/olia/aipa/103cfaq.htm> ("if the reference is a U.S. patent or U.S. patent application publication which is prior art under 35 U.S.C. 102(a) and (e), applicant could swear behind the reference's publication date pursuant to 37 CFR 1.131 to disqualify the reference as prior art under 35 U.S.C. 102(a), and then use 35 U.S.C. 103(c) to disqualify the reference").

In view of the above, Applicants believe that claims 1-13, 15-26 and 28-36 are in condition for allowance, and respectfully request withdrawal of the present rejections.

Respectfully submitted,



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